23-608 Justice Field

Submitted Dec 11th 1874

Post

Shaw

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 535.

THE UNITED STATES, APPELLANTS,

vs.

WILLIAM S. SHREWSBURY.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 2, 1874.

Oct. 2 1874

SUPREME COURT OF THE UNITED STATES.

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WILLIAM S. SHREWSBURY.

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1 *Amended petition.—Under rule* IV.

United States Court of Claims, December term, 1871.

WM. S. SHREWSBURY, No. 4,
vs.
THE UNITED STATES.
} No. 6364. Filed July 9, 1872. J. R.

The petition of Wm. S. Shrewsbury, a citizen of the United States, respectfully represents:

That in the month of March, 1865, he entered into a written contract with Col. J. A. Potter, a quartermaster, acting for and in behalf of the United States, for transportation of military supplies on route No. 2. A copy of said contract is hereto annexed and marked "Exhibit A," and petitioner prays it may be read and considered as part of this petition.

Petitioner shows that he fully carried out and performed the said contract on his part.

Petitioner shows that there was withheld from him of the money due for service performed under said contract for alleged deficiencies which did not in fact exist except so far as they were caused by natural shrinkage and wastage while in transitu, and other causes for which petitioner, by the terms of his said contract, was not responsible, as follows, viz:

By Capt. H. L. Thayer, A. Q. M., acting for and on behalf of the United States, and on or about the 23d day of October, 1865—

From earnings of Fort Lyon, train No. 5, employed under petitioner's said contract, for 4,240 pounds of corn	$601 17
From earnings of Fort Lyon, train No. 7, employed under petitioner's said contract, for 8,062 pounds of corn	1,143 07
From earnings of Fort Lyon, train No. 9, employed under petitioner's said contract, for 5,312 pounds of corn	753 16
From earnings of Fort Lyon, train No. 10, employed under petitioner's said contract, for 987 pounds of corn	139 93
2 From earnings of Fort Lyon, train No. 15, employed under petitioner's said contract, for 10 gallons of whiskey	$27 70

By Col. J. A. Potter, a quartermaster, acting for and on behalf of the United States:

On the 21st day of February, 1866, from earnings of Fort Union, train No. 39, employed under petitioner's said contract, for 12 axes and 112 pounds of steel	55 80
On the 28th of April, 1866, from earnings of Fort Lyon, train No. 1, employed under petitioner's said contract, for 7,195 pounds of corn	1,020 15
On the 12th of October, 1866, from earnings of Fort Lyon, trains Nos. 12, 13, and 14, trains employed under petitioner's said contract, for 109,225 pounds of corn	15,486 54

And petitioner shows that he was prevented by U. S. military authorities from delivering at Fort Union, New Mexico, a portion of the cargo of Fort Union, train No. 67, a train employed under said contract to transport a cargo of military supplies from Fort Leavenworth, Kansas, to Fort Union, New Mexico, to wit: 18,617 pounds of flour, the same having been taken by said authorities from said train at Fort Aubrey, Kansas. And petitioner shows that he was entitled to be paid for the

transportation of the said 18,617 pounds of flour from Fort Leavenworth to Fort Union, a distance of 735 miles, the sum of $2,805.12, and that of the said sum Col. J. A. Potter, a quartermaster, acting for and on behalf of the United States, Oct. 18, 1866, withheld from petitioner the sum of $1,011.38.

Petitioner further shows that there is due him from the United States, as hereinbefore set forth, the aggregate sum of $20,238.90-100.

Petitioner shows that when the said contract was made and when the said service was performed, there were associated with him the following-named persons, viz: Andrew Stuart, (now deceased,) Samuel Slemmons, (now deceased,) Preston Roberts, Chauncy Dewey, Joseph C. Irwin, George W. Howe, David W. Powers, Henry L. Newman, A. and P. Byram, and John Kerr, who, in the execution of the said contract, acted under the firm-name of Shrewsbury, Slemmons & Co., and in the event of a recovery of a judgment the petitioner will be required to account to his associates for their respective interests.

And petitioner shows that he and each of his said associates have at all times borne true allegiance to the U. S. Government, and have never given aid or comfort to rebellion against the said Government, and he prays judgment of this honorable court for the said sum of $20,238.90-100.

HENRY L. NEWMAN,
PRESTON ROBERTS,
Attorneys for Claimant.

3 Preston Roberts, being duly sworn, deposes that he is the attorney for the claimant in the foregoing petition; that no transfer or assignment of said claim or any part thereof or any interest therein has been made, except as in said petition is stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

PRESTON ROBERTS.

Subscribed and sworn to before me this 26th day of June, A. D. 1872.

In testimony whereof I, Ezra R. Hickman, clerk of the county court, have hereunto set my hand and affixed the seal of said court, at office in the city of Independence, this day and date above written.

[SEAL.] EZRA R. HICKMAN.

Henry L. Newman, being duly sworn, deposes that he is one of the attorneys for the claimant in the foregoing petition; that no transfer or assignment of said claim or any part thereof or any interest therein has been made, except as in said petition is stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

HENRY L. NEWMAN.

Subscribed and sworn to before me this 1st day of July, A. D. 1872.

In testimony whereof I, Julius Hang, clerk of the district court of Leavenworth County, State of Kansas, have hereunto set my hand and affixed the seal of said court, at office in the city of Leavenworth, this first day of July, A. D. 1872.

[SEAL.] JULIUS HANG,
Clerk of the District Court of Leavenworth County, Kansas.

Claimant's address, Leavenworth, Kansas.
Claimant's solicitor, C. F. Peck, Washington, D. C.

4 EXHIBIT A.

This agreement, made and entered into this 27th day of March, one thousand eight hundred and sixty-five, by and between Col. J. A. Potter, quartermaster U. S. Army, on the authority and by direction of the Secretary of War, for and on behalf of the United States, of the first part, and William S. Shrewsbury, of Council Grove, Morris County, in the State of Kansas, of the second part, for himself, his heirs, executors, and administrators, witnesseth:

That the said parties have covenanted and agreed, and by these presents do covenant and agree to and with each other, as follows, viz:

ARTICLE I. That the said William S. Shrewsbury shall receive at any time, in any of the months from May to September, inclusive, during the year one thousand eight hundred and sixty-five, from the officers of the Quartermaster's Department, at Forts Leavenworth and Riley, in the the State of Kansas, and the town of Kansas, in the State of Missouri, all such military stores and supplies as may be turned over to him for transportation, in good order and condition, by the officer or agent of the Quartermaster's Department, at any or all of the above-named points or places, and transport the same with all practicable dispatch and deliver them in like good order and condition to the officer or agent of the Quartermaster's Department on duty or designated to receive them at Fort Union, in the Territory of New Mexico, or any other depot that may be designated in that Territory; at any posts or stations that are or may be established in the State of Kansas, or in the Territory of Colorado, south of latitude 40° north; at Fort Garland, or any other point or post on the route, agreeably to the instructions he may receive from an officer or other authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies at Fort Leavenworth, or other place of departure; and for the faithful performance of such service, he shall be paid in the manner hereinafter provided for in article 14 of this agreement, and at the rates specified and shown in the tabular statement hereto annexed, and signed by the parties to this agreement, which statement is considered as part hereof.

ART. II. That the said William S. Shrewsbury agrees and binds himself, his heirs, executors, and administrators, to transport under this agreement, from the post or depots named in Article I, or from and to any other post or depots that may be established within the district named in said article, any number of pounds of military stores and supplies from and between one hundred thousand pounds and fifteen millions of pounds in the aggregate.

ART. III. For the stores to be forwarded from Forts Leavenworth and Riley, or from any other point of departure on the Missouri River, notice shall be given to said William S. Shrewsbury at his place of business or agency in the vicinity of Fort Leavenworth, Kansas.

ART. IV. In order that the said William S. Shrewsbury shall
5 be in readiness to meet the demands and requirements made upon him for transportation, under this contract and agreement, due notice shall be given him or his agent, of the quantity and kind of stores to be transported at any one time; at what points the stores will be ready for delivery to him, and of the place of their destination, subject to such change as may be decided upon while in transitu, as herein provided for, that is to say: for any quantity less than three hundred thousand pounds, twenty days' notice; for any quantity between three hundred thousand and six hundred thousand pounds, twenty-five days' notice; for any quantity between six hundred thousand and one million of

pounds, forty days' notice; for any quantity between one million of pounds and two millions five hundred thousand pounds, fifty days' notice; for any quantity between two millions five hundred thousand pounds and five millions of pounds, sixty days' notice.

ART. V. The military stores and supplies which shall be transported under Article I of this agreement, destined to Fort Union, or other depot that may be designated in the Territory of New Mexico, or to points beyond, shall be consigned to Fort Union or such other depot; and receipts shall be given by the officer of the Quartermaster's Department serving at the place of consignment, for the full amount of stores that shall be delivered; and upon such receipt, payment shall be made to the said William S. Shrewsbury, as hereinafter provided.

ART. VI. That all the means of transportation to be used by the said William S. Shrewsbury, under this agreement, shall be submitted to the inspection of the officer or agent of the Quartermaster's Department, at the place of departure, and such only shall be used as may be then and there accepted by him, provided that the said William S. Shrewsbury shall be authorized to employ mules or cattle, as he may elect.

ART. VII. That to insure the delivery of the stores and to aid the contractor in the execution of his agreement, certificates, setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of the journey, shall be given by the officers or agents of the Quartermaster's Department at the following points, to wit: at Fort Riley and Fort Larned. Upon each certificate so given, setting forth the good condition of the train, payment shall be made to the contractor for the service rendered to that point; and upon arrival of the train at the place of destination or delivery, the officer or agent of the Quartermaster's Department at the point of delivery shall endorse the bill of lading, in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered, upon which endorsement payment shall be made, as per contract, deducting the amount of any payment or payments previously made, and also the value of any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractor.

ART. VIII. In all cases where stores have been transported by
6 the said William S. Shrewsbury, under this agreement, a board of survey shall be called without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, to investigate the facts and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made on it. For loss of weight due to shrinkage, or for leakage of vinegar or molasses or other liquids, the contractor shall not be liable, if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficiencies or damages, the contractor shall pay the costs at the point he receives the articles, and freight shall be deducted in the latter case in proportion to the amount of damage assessed. Should no board of survey be called through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the

contractor has delivered all the stores, as specified in the bill of lading, in good order and condition, and he shall be paid accordingly. If the amount of loss, deficiency, or damage exceeds the value of the bill of lading, it shall be deducted from any after-payments that may become due. Transportation to be paid in all cases according to the actual distance travelled from the place of departure to that of delivery, the distance to be endorsed on the bill of lading by the officer or agent receiving the supplies.

ART. IX. That in case any one or more of the trains of the said Wm. S. Shrewsbury are stopped or delayed at any time or place exceeding two days, either under the orders of an officer of the Quartermaster's Department, or the commanding officer of a post, or of troops present or by any other act on the part of the Government or its agents, the contractor shall be paid upon a statement in writing, procured from the officer or agent of the Government causing the delay, the sum of five dollars per diem for each and every team in the train, for each and every day they may be so delayed, and in case the officer or agent of the Government aforesaid shall refuse to furnish such statement in writing, then the delay shall be paid for, as above, on affidavits or other satisfactory evidence of credible and competent witnesses. All orders from officers or agents of the Government to halt trains, shall be given to the contractor or his agents in writing, expressing fully the reasons thereof.

ART. X. That the said William S. Shrewsbury shall be furnished with a suitable escort for the protection of the supplies, should he be required to transport in any one train a less quantity than one hundred and twenty-five thousand pounds, but whenever required
7 to transport one hundred and twenty-five thousand pounds or more, then no escort shall be furnished.

ART. XI. That the said William S. Shrewsbury shall transport all the military stores and supplies, for which the Quartermaster's Department may require transportation by contract, on the route specified by this agreement, during the year one thousand eight hundred and sixty-five, provided the weight of such military stores and supplies shall not exceed in the aggregate fifteen millions of pounds, yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so.

ART. XII. That in case of failure, by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said William S. Shrewsbury, to be in readiness to meet the demands and requirements made upon him for transportation, under this contract or agreement, after due notice shall have been given him or his agents, as provided for in Article IV of this agreement, then the officer or authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies shall have power to supply the deficiency, either by purchase, hire, or special contract, as the said officer or agent may elect, and the said William S. Shrewsbury will be charged with difference of cost or expense thus incurred.

ART. XIII. It is further understood that, if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure included in this agreement, they shall be carried back at the same rate per hundred pounds per hundred miles, as provided for by said agreement for the month in which said stores were loaded.

ART. XIV. For and in consideration of the faithful performance of the stipulations of the agreement, the said William S. Shrewsbury shall be paid at the office of the Quartermaster's Department at Fort Leavenworth, Kansas, according to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement, in the legal currency of the United States.

ART. XV. It is expressly agreed and stipulated between the parties to this contract, that upon mutual agreement it may be changed, altered, modified, or abrogated in whole or in part.

ART. XVI. It is expressly understood that no member of Congress shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

In witness whereof, the undersigned have hereunto placed their hands and seals, at Fort Leavenworth, Kansas, the day and date above written.

(Signed) J. A. POTTER, [SEAL.]
Col. & Q. M.
WM. S. SHREWSBURY. [SEAL.]

8 *Tabular statement.*

Schedule of prices per one hundred (100) pounds per one hundred (100) miles, to be paid William S. Shrewsbury, contractor for the transportation of military stores and supplies, under an agreement between Col. J. A. Potter, quartermaster U. S. Army, and William S. Shrewsbury, dated Fort Leavenworth, Kansas, the 27th of March, 1865:

Route.	Points of starting.	Periods of starting.					
		May.	June.	July.	Aug.	Sept.	
No. 2.	From and to points and places named in Art. 1 of above agreement.....	$2.05	$2.05	$2.05	$2.05	$2.05	

9 In the Court of Claims of the United States, December term, A. D. 1872.

WM. S. SHREWSBURY
vs.
THE UNITED STATES. } No. 6364.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of twenty thousand two hundred and thirty-eight dollars and ninety cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

WM. McMICHAEL,
Assistant Attorney-General.

Filed Nov. 9, 1872.

10 In the Court of Claims of the United States, December term, 1872.

WM. S. SHREWSBURY
vs.
THE UNITED STATES. } No. 6364.

And now comes the Attorney-General, on behalf of the United States, and says that the claimant herein should not further have or maintain this suit against the defendants, for the reason that the said claimant heretofore filed his petition in this court, claiming to recover against the defendants for alleged breaches of the same identical contract, for breaches of which a recovery is sought in this cause, which said contract was counted upon, annexed to, and formed part of said petition; and such proceedings were thereupon had in said court, that said cause was duly tried before said court at the December term thereof, 187 , and judgment duly rendered on the merits thereof, on the 5th day of February, 1872, in favor of the defendants, and against said claimants; which said judgment is still in full force and effect, and unreversed, as by the record thereof in this court will more fully appear, reference being thereto had; and that the supposed breaches of covenant, and the alleged causes of action upon which a recovery is claimed in this cause, had each and all then already occurred and accrued at the time of the filing of the petition, and the commencement of the said former suit, in which judgment was so rendered as aforesaid; and this the said defendants are ready to verify.

Wherefore they pray judgment, &c.

J. GOFORTH,
Assistant Attorney-General.

Filed April 23, 1873.

10½ In the Court of Claims of the United States, December term, 1872.

WM. S. SHREWSBURY
vs.
THE UNITED STATES. } No. 6364.

Plea.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain this suit against the defendants, for the reason that the petition of the claimant was not filed in this court, nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney-General.

Filed Oct. 15, 1873.

No. Court of Claims vs. The United States. Plea.
Assistant Attorney-General. Filed , 187 .

11 In the Court of Claims.

WILLIAM S. SHREWSBURY
vs.
THE UNITED STATES. } No. 6364.

At a Court of Claims held at the Capitol, in the city of Washington, eighteenth day of May, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said William S. Shrewsbury do have and recover of and from the United States the sum of fifteen thousand three hundred and forty-four dollars and twenty-eight cents, ($15,344.28.)

By the court:

12 In the Court of Claims of the United States, December term, 1873

WM. S. SHREWSBURY
vs.
THE UNITED STATES. } No. 6364.

From the judgment rendered in the above-entitled cause on May 18, 1874, in favor of claimant, the defendants, by their Attorney-Genl., on the 30th day of June, 1874, make application for and give notice of an appeal to the Supreme Court of the United States, the amount in controversy in said cause exceeding three thousand dollars, to wit, fifteen thousand three hundred and forty-four dollars and twenty-eight cents.

JOHN GOFORTH,
Assistant Attorney-General.

Filed June 30, 1874.

AT CHAMBERS.

Allowed.

13 C. D. DRAKE, *C. J.*

14 Court of Claims.

WILLIAM S. SHREWSBURY, No. 4,
vs.
THE UNITED STATES.

Findings of fact and conclusions of law.

This case having been heard before the Chief-Justice and judges of the Court of Claims, at the city of Washington, on the fourth day of March, 1874, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

FINDINGS OF FACT.

I. The defendant's quartermaster, Col. J. A. Potter, and the claimant, on the 27th March, 1865, entered into the transportation contract annexed to and forming part of the petition.

II. On the 2d June, 1865, the claimant's transportation train,

15 No. 5, received, at Fort Leavenworth, Kansas, eight hundred and fifty-eight (858) sacks of corn, weighing in the aggregate 101,860 lbs., averaging 118¾ lbs. per sack. The train arrived at Fort Lyon, Colorado, in the latter part of July, and delivered the corn in good order, except that nine (9) sacks, amounting to 1,069 lbs., were lost. But, by reason of the difference or imperfection of the scales used in the determination of the weight of the remainder and the shrinkage in weight upon the road, the remaining eight hundred and forty-nine (849) sacks were reported to weigh on 97,620 lbs. instead of 100,791 lbs., their weight when they left Fort Leavenworth, and the claimant was charged with the loss of 3,171 lbs. A board of survey was ordered on the 31st July, 1865, which met on the 1st August, 1865, and examined the supplies delivered.

The following are the proceedings of the board, as reported to the commanding officer and as attached to the bill of lading:

16 "Proceeding of a board of survey which assembled at Fort Lyon, C. T., by virtue of the following order, viz:

"HEADQUARTERS, FORT LYON, C. T.,
"*July* 31*st*, 1865.

"[Special Order No. 145.]

"A board of survey is hereby ordered to meet at the commissary building to-morrow morning, at 9 o'clock, or as soon thereafter as practicable, to examine and report upon the quantity and condition of certain commissary and quartermaster' stores being received by Lieut. C. M. Cossitt, A. A. Q. M. & A. C. S.

"DETAIL FOR THE BOARD.

"1st Lieut. J. A. Cramer, Vet. Batt., 1st Col. Cav.
"1st " Henry Gronheim, 15th Kan. Cav.
"By order of Theo. Conkey, capt. comdg. post.
(Signed) "JAMES OLNEY,
"2*d Lieut. & Post Adjutant.*

"FORT LYON, C. T., *Aug.* 1*st*, 1865.

"The board met pursuant to the above order. Present, 1st Lieut. J. A. Cramer, Vet. Batt., 1st Col. Cav., & 1st Lieut. Henry Gronheim, 15th Kan. Cavy., and proceeded to examine the supplies delivered by freight-contractor W. S. Shrewsbury, in contractors' train No. 124, Fort Lyon No. 5, and find as follows:

"Packages all correct and in good order, with the exception of nine sacks of corn deficient; weight agreeing with the B. L., with the exception of four thousand two hundred and forty (4,240) pounds of corn deficient.

"The board, therefore, recommend that the deficiency of corn be charged to the freight-contractor, and that Lieut. C. M. Cossitt, A. A. Q. M., be permitted to drop said deficiency from his return.

"The board then proceeded to other business.

"JOSEPH A. CRAMER,
"1*st Lieut., Vet. Batt., 1st Col. Cav., President.*
"HENRY GRONHEIM,
"1*st Lieut., 15th Kansas Cavalry, Recorder.*

"Approved.

"THEO. CONKEY,
"*Capt., 3d Wis. Cav., Comdg. Post.*"

In pursuance of the foregoing recommendation the claimant was charged by the Quartermaster Department for the loss of nine (9) sacks of corn, and in addition to the nine (9) sacks of corn, with the 3,171 lbs. of difference in weight of the remainder of the corn before mentioned,
17 and for this difference $449.61 was deducted from his account. The claimant has never been paid this balance. A general account was stated between the parties, showing the amounts allowed and deducted, entitled an account "For the transportation of military stores from Fort Leavenworth, Kansas, to Fort Riley, Kansas, on route No. 2, under contract with the United States, dated March 27, 1865, as per the accompanying bills of lading, receipts, and proceedings of boards of survey, to wit:"

The claimant was paid the total of the amounts allowed, and at the foot he gave the following receipt:

"Received at Fort Leavenworth, Ks., the 23rd of October, 1865, of Capt. H. L. Thayer, asst. qrmr. U. S. Army, the sum of ninety-one thousand two hundred and forty-three dollars and sixty cents, in full of the above account.

(Signed in duplicate.)

"W. S. SHREWSBURY,
"By ANDREW STUART,
"*His Attorney.*"

18 At the time of receiving payment he protested against the deduction, and notified the quartermaster who made the payment that he should look to the defendants for a corrected adjustment and full payment.

III. On the 6th June, 1865, the claimant's train No. 7 received at Fort Leavenworth, Kansas, five hundred and seventy-six (576) sacks of corn, weighing in the aggregate 66,990 lbs., averaging 116¼ lbs. per sack. The train arrived at Ft. Lyon in the latter part of July and delivered the corn in good order, except that forty-five sacks, amounting to 5,233 lbs., were lost. But, by reason of the difference or imperfection of the scales used in the determination of the weight of the remainder and the shrinkage in weight upon the road, the remaining 531 sacks were reported to weigh only 58,944 lbs. instead of 61,773 lbs., their weight
19 when they left Ft. Leavenworth, and the claimant was charged with the loss of 2,829 lbs. A board of survey was ordered on the 31st July, 1865, which met on the 1st of August, 1865, and examined the supplies delivered.

The following are the proceedings of the board, as reported to the commanding officer and attached to the bill of lading:

"Proceedings of a board of survey which assembled at Fort Lyon, C. T., by virtue of the following order, viz:

"HEADQRS. FORT LYON, C. T.
"*July 31st*, 1865.

"[Special Order No. 145.]

"A board of survey is hereby ordered to meet at the commissary buildings to-morrow morning, at 9 o'clock, or as soon thereafter as practicable, to examine and report upon the quantity and condition of certain commissary and quartermaster's stores being received by Lieut. C. M. Cossitt, A. A. Q. M. & A. C. S.

"DETAIL FOR THE BOARD.

"1st Lt. J. A. Cramer, Vet. Batt., 1st Col. Cavy.
"1st Lt. Henry Gronheim, 15th Kansas Cavly.
"By order of Theo. Conkey, capt. comdg. post.
(Signed) "JAMES OLNEY,
"*2d Lt. & Post Adjutant*

"FORT LYON, C. T., *August 1st*, 1865.

"The board met pursuant to the above order. Present, 1st Lt. J. A. Cramer, Vet. Batt., 1st Col. Cavy., 1st Lt. Henry Gronheim, 15th Kansas Cavly., and proceeded to examine the supplies delivered by freight-contractor W. S. Shrewsbury, in contractor's train No. 131, Fort Lyon No. 7, and find as follows:

"Condition good, weight agreeing with the B. L., with the exception of forty-five (45) sacks of corn deficient, and a deficiency of eight thousand & sixty-two (8,062) pounds of corn.

"The board recommend that the freight-contractor be charged with the deficiency of eight thousand sixty-two (8,062) pounds of corn, and that Lieut. C. M. Cossitt, Vet. Batt., 1st Col. Cavy., & A. A. Q. M., be allowed to drop the same from his return.

"The board then proceeded to other business.

"JOSEPH A. CRAMER,
"*1st Lt. Vet. Batt., 1st Col. Cavy., President.*
"HENRY GRONHEIM,
"*1st Lt. 15th Kas. Cav., Recorder.*

"Examined and approved.

"THEO. CONKEY,
"*Capt. 3d Wis. Cavalry, Commanding Post.*"

20 In pursuance of the foregoing recommendation the claimant was charged by the Quartermaster Department for the loss of forty-five (45) sacks of corn, and in addition to the 45 sacks of corn with the 2,829 lbs. of shrinkage before mentioned, and for this shrinkage $401.11 was deducted from his account. The claimant has never been paid this balance. A general account was stated between the parties showing the amounts allowed and deducted. The claimant was paid the total of the amount allowed, and at the foot he gave the receipt before mentioned, accompanied by the same protest.

IV. On the 8th June, 1865, the claimant's transportation train No. 9 received at Fort Leavenworth, Kansas, six hundred and ninety-three (693) sacks of corn, weighing in the ag regate 79,640. The train arrived at Fort Lyon, Colorado, in the latter part of July and delivered the corn in good order and condition; but by reason of the differ-
21 ence or imperfection of the scales used in the determination of the weight, and by reason of the shrinkage of the weight upon the road, the corn was reported to weigh only 74,328 lbs. instead of 79,640 lbs., the weight when it left Fort Leavenworth, and the claimant was charged with the loss of 5,312 lbs. A board of survey was ordered on the 31st July, 1865, which met on the 1st August, 1865, and examined the supplies delivered. The following are the proceedings of the board as reported to the commanding officer, and as attached to the bill of lading:

"Proceedings of a board of survey which assembled at Fort Lyon, C. T., by virtue of the following order, viz:

["Special Order No. 145.]

"HEADQUARTERS, FT. LYON, C. T.,
"*July* 31, 1865.

"A board of survey is hereby ordered to meet at the commis-
22 sary building to-morrow morning at 9 o'clock, or as soon there-
after as practicable, to examine and report upon the quantity & condition of certain commissary and quartermaster's stores being received by Lieut. C. M. Cossitt, A. A. Q. M. & A. C. S.

"DETAIL FOR THE BOARD.

"1st Lieut. J. A. Cramer, Vet. Batt., 1st Colorado Cavalry;
"1st " Henry Gronhiem, 15th Kansas Cavalry.
"By order of Theo. Conkey, captain commanding post.
(Signed) "JAMES OLNEY,
"*2d Lieut & Post Adjutant.*

"FORT LYON, C. T., *August 1st*, 1865.

"The board met pursuant to the above order—present, 1st Lt. J. A. Cramer, Vet. Bat., 1st Colorado Cavalry, and 1st Lieut. Henry Gronhiem, 15th Kansas Cavalry, and proceeded to examine the supplies delivered by freight contractor W. S. Shrewsbury, in contractor's train No. 140, Fort Lyon No. 9, and find as follows:

"Condition, good; number of sacks agreeing with the B. L., being six hundred and ninety-three, (693,) with a deficiency in weight of five thousand three hundred and twelve (5,312) pounds of corn.

"The board recommend that the freight contractor be charged with the deficiency, and that Lieut. C. M. Cossitt, Vet. Bat., 1st Colorado Cavalry, & A. A. Q. M., be allowed to drop the deficiency of five thousand three hundred and twelve (5,312) pounds of corn from his return.

"The board then proceeded to other business.

"JOSEPH A. CRAMER,
"*1st Lieut. Vet. Bat., 1st Colorado Cavy., President.*
"HENRY GRONHEIM,
"*1st Lieut. 15th Kans. Cavy., Recorder.*

"Examined and approved:

"THEO. CONKEY,
"*Capt. 3d Wis. Cav. Vols., Commanding Post.*"

In pursuance of the foregoing recommendation the claimant was charged by the Quartermaster's Department with the 5,312 lbs. of difference in weight before mentioned, and for this difference $753.16 was deducted from his account. He has never been paid this balance. A gen-
eral account was stated between the parties, showing the amounts
23 allowed and deducted. The claimant was paid the total of the amount allowed, and at the foot he gave the receipt before mentioned in the second finding, accompanied by the same protest.

V. On the 8th June, 1865, the claimant's transportation train No. 10 received at Fort Leavenworth, Kansas, two hundred and eighty-one sacks of corn, weighing in the aggregate 31,850 lbs. The train arrived at Ft. Lyon, Colorado, the latter part of July, and delivered the corn in good order and condition; but by reason of difference or imperfection of the scales used in the determination of the weight, and by reason of the shrinkage in weight on the road, the corn was reported to weigh

only 30,863 lbs. instead of 31,850 lbs., the weight when it left Fort Leavenworth, and the claimant was charged with the loss of 987 lbs. A board of survey was ordered on the 31st July, 1865, which met
24 on the 1st August, 1865, and examined the supplies delivered. The following are the proceedings of the board as reported to the commanding officer, and as attached to the bill of lading:

"Proceedings of a board of survey which assembled at Fort Lyon, C. T., by virtue of the followings orders, viz:

["Special Order No. 145.]

"HEADQUARTERS, FT. LYON, C. T.,
"*July 31st*, 1865.

"A board of survey is hereby ordered to meet at the commissary building to morrow morning at 9 o'clock, or as soon thereafter as practicable, to examine and report upon the quantity and condition of certain com'issary and quartermaster's stores being received by Lieut. C. M. Cossett, A. A. Q. M. & A. C. S.

"DETAIL FOR THE BOARD.

"1 Lt. J. A. Cramer, Vet. Batt. 1st Col. Cav.;
"1st Lt. Henry Gorham, 15th Kans. Cav.
"By order of Theo. Conkey, capt. 3d Wis. Cav., commanding post.
(Signed) "JAMES ONLEY,
"*2d Lt. & Post Adjutant.*

25 "FORT LYON, C. T., *Aug. 3d*, 1865.

"The board met pursuant to the above order—Present, Lt. J. A. Cramer, Vet. Batt., 1st Col. Cav., and 1st Lieut. Henry Gorham, 15th Kans. Cav., and proceeded to examine the supplies delivered by freight contractors W. S. Shrewsbury in contractor's train No. 141, Fort Lyon No. 10, and find as follows:

"Condition good; weight agreeing with the B. L., with the exception of nine hundred & eighty-seven pounds of corn deficient. The board recommend that the freight contractors be charged with the deficiency of nine hundred & eighty-seven (987) pounds of corn, and that Lt. C. M. Cossitt, Vet. Batt., 1st Col. Cav., A. A. Q. M., be allowed to drop the same from his returns.

"JOSEPH A. CRAMER,
1st Lt. Vet. Batt., 1st Col. Cav., President.
"HENRY GRONHEIM,
"*1st Lt. 15th Kans. Cav., Recorder.*

"The board having no further business, adjourned.

"JOSEPH A. CRAMER,
"*1st Lt. Vet. Batt., 1st Col. Cav., President.*
"HENRY GRONHEIM,
"*1st Lt. 15th Kans. Cav., Recorder.*

"Examined and approved:

"THEO. CONKEY,
"*Captain 3d Wis. Cav., Com'd'g Post.*"

In pursuance of the foregoing recommendations the claimant was charged by the Quartermaster' Department with the 987 lbs. of difference in weight before mentioned, and for this difference $139.93 was deducted from his account. The claimant has never been paid this balance. A general account was stated between the parties, showing the amounts allowed and deducted. The claimant was paid the total of the

amounts allowed, and at the foot he gave the receipt before mentioned in the first finding, accompanied by the same protest.

26 VI. On the 15th June, 1865, the claimant's transportation train No. 15 received at Fort Leavenworth, Kansas, *as* twelve (12) barrels of whiskey, gauging in the aggregate five hundred and eight (508) gallons. The train arrived at Fort Lyon, Colorado, the latter part of July, and delivered the 12 barrels in good order except that ten (10) gallons thereof had been abstracted on the road.

A board of survey was ordered on the 31st July, 1865, which met on the 1st August, 1865, and examined the supplies delivered. The following are the proceedings of the board, as reported to the commanding officer and as attached to the bill of lading:

"Proceedings of a board of survey which met at Fort Lyon, Col. Ter., pursuant to the following order, viz:

["Special Order No. 145.]

"HEADQUARTERS, FORT LYON, C. T.,
"*July* 31*st*, 1865.

27 "A board of survey is hereby ordered to meet at the commissary buildings to-morrow morning at 9 o'clock, or as soon thereafter as practicable, to examine and report upon the quantity and condition of certain commissary and quartermaster stores being received by Lieut. C. M. Cossitt, A. Q. M. & A. C. S.

"DETAIL FOR THE BOARD.

"1st Lieut. J. A. Cramer, Vet. Bat., 1st Col. Cav.;
"1st Lieut. Henry Gronheim, 15th Kansas Cav. Vols.
"By order of Theo. Conkey, captain com'd'g post.
(Signed) "JAMES OLNEY,
"*Lieut. and Adjutan*

"FORT LYON, COL. TER., *Augs.* 1*st*, 1865.

"The board met this day pursuant to the above order. Present, all the members. The board proceeded to examine and receive all the stores from train No. 15, W. S. Shrewsbury, contractor, transferred by Col. J. A. Potter, Q. M. U. S. Army, to Lieut. C. M. Cossitt, A. A. Q. M., F't Lyon, C T., and find them as follows, viz:

Number.	Articles.	Marked No., weight, or measure.	Actual No., weight, or measure.	Deficiency.	Condition.	Remarks.
3	Mowing-machines	2, 130 lbs.	.....	.....	)	
2	Horse-rakes	150 lbs.	.....	.....		
10	Wagon-timber, large	2, 000 lbs.	.....	.....		
14	Do. do., small	1, 140 lbs.	.....	.....		
12	Bbls. whiskey	508 gallons.	498 gallons.	10 gallons	.....	Whiskey taken out of barrel.
4	" molasses	178 do.	176 "	.....		
28	" sugar, Y	8,258 pounds	8,050 pounds	208 pounds	Good.	168 lbs. of sugar, natural shrinkage, & 40 lbs. lost by freighter.
40	Boxes pepper	1,000 "	1,000 "	.....		
142	" soap	8,525 "	8,525 "	.....		
4	S'ks Java coffee	642 "	642 "	.....		
89	S'ks shoulders	10,754 "	9,518 "	1,236 pounds	.....	Natural shrinkage through heat of climate.
44	Do. bacon	5,287 "	4,462 "	825 "	.....	" " " " " "

"The board are of the opinion that the whiskey was abstracted by some of the escort under the command of Capt. Stombs, 1st California Cav'y, andnot by any fault of the freighter, and, therefore, recommend

that the amount, 10 gall's whiskey, be charged to Capt. Stombs, 1st Cal. Cav'y, and that Lieut. C. M. Cossett be allowed to drop the amount from his papers.

"The deficiency in the sugar of 168 lbs. is caused by natural shrinkage, & 40 lbs. lost by the freighter. The board, therefore, recommend that 40 lbs. sugar be charged to the freight contractor, and that the A. C. S. be allowed to drop the deficiency, 208 lbs., from his papers.

"The deficiency in bacon & shoulders is caused through shrinkage by heat of climate, and the board therefore recommend that Lieut. C. M. Cossitt be allowed to drop the deficiency, viz, 1,236 lbs. shoulders & 825 bacon, from his papers accordingly.

"The board then proceeded to other business.

(Signed) "JOSEPH A. CRAMER,
"*1st Lieut. Vet. Bat., 1st Col. Cav'y, President.*

(Signed) "HENRY GRONHEIM,
"*1st Lieut. 15th K's Cav'y Vols., Recorder.*

"Examined & approved:

(Signed) "THEO. CONKEY,
"*Capt. 3d Wis. Cav., Com'd'g Post.*

"A true copy:

"JOS. A. CRAMER,
"*1st Lieut. Vet. Bat., 1st Col. Cav'y, Post Adjutant.*"

But notwithstanding the recommendation of the board the claimant was charged by the Quartermaster Department with the loss of
28 the 10 gallons of whiskey and the sum of $19.50 was deducted from his account. He has never been paid this balance. A general account was stated between the parties, showing the amounts allowed and deducted. The claimant was paid the total of the amounts allowed, and at the foot he gave the receipt before mentioned in the second finding, accompanied by the same protest.

VII. On the 20th August, 1865, the claimant's transportation train No. 39 received at Fort Leavenworth, Kansas, one (1) bundle of iron weighing ninety-three (93) lbs., and one (1) box of Babbit metal weighing 30 lbs., but the claimant at the same time receipted for one (1) bundle of cast steel weighing 112 lbs., and one (1) box of axes weighing 59 lbs., it being mutually supposed that the articles delivered to him were the articles for which he receipted.

The train arrived at Fort Union, New Mexico, in November,
29 1865, and delivered the iron and Babbit metal in good order.

A board of survey was ordered on the 14th November, 1865, by the quartermaster commanding the depot, which board consisted of himself and no other officer. The following are the proceedings of the board as attached to the bill of lading:

"Proceedings of a board of survey which assembled at Fort Union Depot, New Mexico, by virtue of the following orders, viz:

"[Special Orders No. 3.]

"DEPOT QUARTERMASTER'S OFFICE,
"*Fort Union, New Mexico, 14th Nov'r, 1865.*

"A board of survey, to consist of Capt. H. J. Farnsworth, assistant quartermaster U. S. Vols., will assemble at this depot at 9 o'clock a. m., or as soon thereafter as practicable, to examine and report upon the condition and quantity of a lot of military supplies, to be delivered by

freight contractor W. S. Shrewsbury, on his bill of lading of train No. 338, (Fort Union train No. 39.)

(Signed) "H. J. FARNSWORTH,
"*Capt. & Asst. Quartermaster, Commanding Depot.*

"FORT UNION DEPOT, N. M., *14th Nov.*, 1865.

"The board met pursuant to the above orders—present, Capt. H. J. Farnsworth, assistant quartermaster U. S. Vols.—and proceeded to examine the supplies delivered by freight contractor W. S. Shrewsbury in contractor's train No. 338, (Fort Union train 39,) and finds them of follows:

"All in good order and condition except the following-named articles, which were deficient as p. bill of lading: (1) one coil or (30) thirty pounds of ¼-inch rope; (1) one box containing (12) twelve felling-axes; (1) one set of measures; (1) one b'dl' cast steel, or (112) one hundred and twelve pounds, & (1) one box containing (1,200) twelve hundred pistol cartridges, 'cal. 44.' The board also finds one bale of wagon-covers broken open and (6) six wagon-covers deficient, and one b'dl' of iron in excess of bill of lading. The board is of the opinion that the contractor, W. S. Shrewsbury, should be charged with the following-named articles: (30) thirty pounds of ¼-in. rope; (12) twelve felling-axes; (1) one set of measures; (112) one hundred & twelve pounds of cast steel; (1,200) twelve hundred pistol cartridges, 'cal. 44,' and (6) six wagon-covers. The board also recommend that the contractor, W. S. Shrewsbury, be paid freight upon (1) one b'dl' of iron, weight (93) ninety-three pounds, and (1) one box of Babbit metal weighing 30 lbs., the same having been delivered in excess of bill of lading.

(Signed) "H. J. FARNSWORTH,
"*Capt. & Asst. Q. M., U. S. Vols.*

"The board, having no further business before it, adjourned.

(Signed) "H. J. FARNSWORTH,
"*Capt. & Asst. Qrmr., U. S. Vols.*

"Approved:

(Signed) "H. J. FARNSWORTH,
"*Capt & Asst. Qrmr., U. S. Vols., Commanding Depot.*

"A true copy:

"H. J. FARNSWORTH,
"*Capt. & Asst. Qrmr., U. S. Vols., Commanding Depot.*"

30 In pursuance of the foregoing recommendation the claimant was credited with the transportation of the iron and Babbit metal, and charged with the loss of the steel and axes, and $55.80 was deducted from his account by the Quartermaster Department. He has never been paid this balance. A general account was stated between the parties, showing the amounts allowed and deducted, entitled an account "For the transportation of military stores from Fort Leavenworth, Kansas, to Fort Union, New Mexico, on route No. 2, under contract with the United States March 27th, 1865, as per the accompanying bills of lading, receipts, and reports of board of survey."

The claimant was paid the total of the amounts allowed, and at the foot he gave the following receipt:

"Received, at Fort Leavenworth, the 21st of February, 1866, of Col. J. A. Potter, quartermaster United States Army, the sum of sixteen

thousand four hundred & ninety-nine dollars and forty-eight cents, in full of the above account.

(Signed in duplicate)

"W. S. SHREWSBURY,
"By A. STUART, *his Attorney.*"

31 At the time of receiving payment he protested against the deductions, and notified the quartermaster who made the payment that he should look to the defendants for a corrected adjustment and full payment.

VIII. On the 9th June, 1865, the claimant's train No. 12 received at Fort Leavenworth, Kansas, one thousand two hundred and ninety-two (1,292) sacks of corn, weighing in the aggregate 153,150 lbs., averaging 118½ lbs. per sack. The train arrived at Fort Lyon in the latter part of August, 1865, and delivered the corn, except forty-six (46) sacks which had been taken by a military officer at Camp Wyncoop for soldiers stationed there. But by reason of the difference or imperfection of the scales used in the determination of the weight of the remainder, and by reason of the shrinkage in weight on the road, the remaining 1,246
32 sacks were reported to weigh only 119,930 lbs. instead of 147,699 lbs., their weight when they left Fort Leavenworth, and the claimant was charged with the loss of 29,769 lbs. A board of survey was ordered on the 22nd August, 1865, which met on the same day and examined the stores delivered. The following are the proceedings of the board as reported to the commanding officer and as attached to the bill of lading:

"Proceedings of a board of survey which convened at the Q. M. rooms at Fort Lyon, C. T., by virtue of the following order:

["Special Orders No. 158.]

"HEADQUARTERS, FT. LYON, C. T.,
"*August 22d*, 1865.

"A board of survey is ordered to meet at the quartermaster's storerooms at 9 o'c. a. m., to examine into and report upon the condition and quantity of certain quartermaster and commissary stores now being received by Lieut. C. M. Cossitt, A. A. Q. M. & A. C. S.

"DETAIL FOR THE BOARD.

"1st Lieut. M. M. Ehle, 3d Wis. Cav'l'y.
"2d " P. Kinnevan, 5th U. S. Inf'ty.
"By order Theo. Conkey, capt. 3d Wis. Cav., com'd'g post.
(Signed) "M. M. EHLE,
"*1st Lieut. & Adjutant.*

"FORT LYON, C. T., *Aug. 22d*, 1865.

"The board met pursuant to the above order—present, Lieut. M. M. Ehle, 3d Wis. Cav., and Lieut. P. Kinnevan, 5th U. S. Inf'ty—and proceeded to examine the stores delivered by freight contractors' train No. 149, Fort Lyon No. 12, and find as follows: Stores in bad condition, with a deficiency of forty-six (46) sacks and thirty-five thousand two hundred & twenty pounds of corn, (35,220.)

"The board therefore recommend that the freight contractor be charged with the deficiency, and that Lieut. C. M. Cossitt, Vet. Batt.,

1st Col. Cav., A. A. Q. M., be allowed to drop from his return the deficiency of forty-six gunny sacks and thirty-five thousand two hundred & twenty (35,220) pounds of corn.

"The board then proceeded to other business.

(Signed) "M. M. EHLE,
"*1st Lt. 3d Wis. Cav., President.*
"P. KINNEVAN,
"*2d Lt. 5th U. S. Inf'ty, Recorder.*

"Approved:

(Signed) "THEO. CONKEY,
"*Capt. 3d Wis. Cav., Com'd'g Post.*

"A true copy:

"C. M. COSSITT,
"*Lt. Vet. Batt., 1st Col. Cav.*"

33 In pursuance of the foregoing recommendation, the claimant *the claimant* was charged by the Quartermaster Department for the loss of the 46 sacks, weighing 5,451 lbs., and, in addition, with the 29,769 lbs. of difference in weight of the remainder of the corn before mentioned; and for this difference $4,221.66 was deducted from his account, and for the 46 sacks $772.03 was also deducted, making the aggregate of deductions $4,993.69.

The claimant has never been paid this balance. A general account was stated between the parties, showing the amounts allowed and deducted, entitled, an account "For the transportation of the following military stores from Fort Leavenworth, Kansas, to Fort Lyon, C. T., on route No. 2, under contract with the United States, dated March 27, 1865, as per the accompanying bills of lading and receipts and reports
34 of board of survey." The claimant was paid the total of the amounts allowed, and at the foot he gave the following receipt:

"Received, at Ft. Leavenworth, K's, the 12th of October, 1866, of B'v't Brig. Gen'l J. A. Potter, quartermaster United States Army, the sum of three thousand & seventy-two dollars and sixty cents, in full of the above account.

(Signed in duplicate.) "W. S. SHREWSBURY,
"By ANDREW STUART,
"*His Atty.*"

At the time of receiving payment he protested against the deductions, and notified the quartermaster who made the payment that he should look to the defendants for a corrected adjustment and full payment.

IX. On the 10th June, 1865, the claimant's transportation-train No. 13 received at Fort Leavenworth, Kansas, (698) six hundred and ninety-eight sacks of corn, weighing, in the aggregate, 78,740 lbs., averaging 112.8 lbs. per sack. The train arrived at Fort Lyon, Colorado, in the latter part of August, 1865, and delivered the corn, except 18 sacks, amounting to 2,030 lbs., which were lost. The quartermaster also rejected as being in bad condition 72 sacks, weighing 8,122 lbs.
35 The remaining 608 sacks were accepted. But by reason of the difference or imperfection of the scales used in the determination of the weight, and by reason of the shrinkage in weight upon the road, they were reported by the quartermaster to weigh only 52,300 lbs. instead of 68,588 lbs., their weight when they left Fort Leavenworth, and the claimant was charged with the loss of 16,288. A board of survey was ordered on the 22d August, 1865, which met on the 23 August, 1865,

and examined the supplies delivered. The following are the proceedings of the board as reported to the commanding officer and as attached to the bill of lading:

"Proceedings of a board of survey which convened at the Q. M. store-rooms at Fort Lyon, C. T., by virtue of the following order:

["Special Order No. 158.]

"HEADQUARTERS FORT LYON, C. T.,
"*August 22d*, 1865.

"A board of survey is hereby ordered to meet at the quartermaster's store-rooms at 9 o'clock a. m., to examine into and report upon the condition and quantity of certain quartermaster and commissary stores now being received by Lieut. C. M. Cossit, A. A. Q. M.

"DETAIL FOR THE BOARD.

"1st Lieut. M. M. Ehle, 3d Wis. Cav'l'y.
"2d " P. Kinnevan, 5th U. S. Vols.
"By order of Theo. Conkey, capt. 3d Wis. Cav., com'd'g post.
(Signed) "MARSHAL M. EHLE,
"*1st Lieut. & Adjutant.*"

"FORT LYON, C. T., *August 23d*, 1865.

"The board met pursuant to the above order—present, Lieut. M. M. Ehle, 3d Wis. Cav., and Lieut. P. Kinnevan, 5th U. S. Vols.—and proceeded to examine the supplies delivered by freight contractors W. S. Shrewsbury, in contractors' train No. 152, Fort Lyon No. 13, and find as follows:

"The stores in bad condition, with a deficiency of ninety (90)
36 gunny-sacks, and twenty-six thousand four hundred & forty (26,440) pounds of corn.

"The board therefore recommended that the freight contractor be charged with the deficiency, and that Lieut. C. M. Cossitt, Vet. Batt., 1st Col. Cav'l'y, & A. A. Q. M., be allowed to drop from his returns the deficiency of ninety (90) gunny-sacks and twenty-six thousand four hundred & forty (26,440) pounds of corn.

"The board then proceeded to other business.
(Signed) "MARSHAL M. EHLE,
"*1st Lieut. 3d Wis. Cav'l'y, President.*
(Signed) "P. KINNEVAN,
"*2d Lieut. 5th U. S. Vols., Recorder.*

"Approved:
(Signed) "THEO. CONKEY,
"*Capt. 3d Wis. Cav'l'y, Com'd'g Post.*

"A true copy:
"C. M. COSSITT,
Lt. Vet. Batt., Col. Cav'l'y, A. A. Q. M."

In pursuance of the foregoing recommendation, the claimant was charged by the Quartermaster Department for the loss of ninety (90) sacks, made up of the 18 sacks actually lost and the 72 sacks rejected as being in bad order, and, in addition to the 90 sacks, he was also charged with the 16,288 lbs. of difference in weight of the remainder of the corn before mentioned, and for this difference $2,309.40 was deducted

from his account, and there was also deducted for transportation on the 72 sacks rejected $832.50, making the total reductions $3,141.90, in addition to the deductions for its value of the 18 sacks of corn
37 lost and for the 72 sacks thrown back upon the contractor's hands. As to the 72 sacks, they were carried back by the contractor to Fort Leavenworth, and not being accounted for by him, no claim is now made for them. The claimant has never been paid the above reduction of $3,141.90. A general account was stated between the parties, showing the amounts allowed and deducted. The claimant was paid the total of the amounts allowed, and at the foot he gave the receipt before mentioned in the 8 finding, accompanied by the same protest. It has not been shown by the defendants, otherwise than by the proceedings of the board, that the corn rejected as being in bad condition was in bad condition when tendered to the quartermaster at Fort Lyon, nor that the injury to it, if any, was occasioned by any fault of the contractor upon the journey.

38 X. On the 12th June, 1865, claimant's transportation train No. 14, received, at Fort Leavenworth, Kansas, one thousand two hundred and eighty-five (1,285) sacks of corn, weighing in the aggregate 150,930 lbs., averaging 117.45 lbs. per sack. The train arrived at Fort Lyon, Colorado, in the latter part of August, 1865, and delivered the corn, except that 122 sacks, weighing 14,329 lbs., were rejected by the quartermaster as being in bad condition. The remaining 1,163 sacks were accepted; but by reason of the difference or imperfection of the scales used in the determination of the weight, and by reason of the shrinkage in weight upon the road, they were reported to weigh only 103,365 lbs. instead of 136,601 lbs., the weight when they left Fort Leavenworth, and the claimant was charged with the loss of 33,236 lbs.

A board of survey was ordered on the 22d of August, 1865, which
39 met on the 24th August, 1865, and examined the supplies delivered. The following are the proceedings of the board as reported to the commanding officer and as attached to the bill of lading:

"Proceedings of a board of survey which convened at the Q. M. store-rooms at Fort Lyon, C. T., by virtue of the following order:

["Special Order No. 158.]

"HEADQUARTERS FORT LYON, C. T.,
"*Aug.* 22, 1865.

"A board of survey is hereby ordered to meet at the quartermaster's store-rooms at 9 o'clock a. m., to examine into and report upon the condition and quantity of certain quartermaster's and com'issary stores now being received by Lieut. C. M. Cossett, A. A. Q. M.

"DETAIL FOR THE BOARD.

"1st. Lieut. M. M. Ehle, 3d Wis. Cavly.;
"2d " P. Kinnevan, 5th U. S. Vols.
"By order of Theo. Conkey, capt. 3d Wis. Cavly., commanding post.
(Signed) "MARSHAL M. EHLE,
"*1st Lieut. & Adjutant.*

40 "FORT LYON, C. T., *Aug.* 24, 1865.

"The board met pursuant to the above order—present, Lieut. M. M. Ehle, 3d Wis. Cav., and Lieut. P. Kinnevan, 5th U. S. Vols.—and pro-

ceeded to *to* examine the stores delivered by freight contractor W. S. Shrewsbury, in contractor's train No. 162, Fort Lyon No. 14, and find as follows: The corn in bad condition with a deficiency of one hundred and twenty-two (122) gunny-sacks, and forty-seven thousand five hundred and sixty-five (47,565) pounds in weight. The board also find two (2) boxes of C. C. and G. E. broken open, with a deficiency of three (3) pairs of sewed boots.

"The board therefore recommend that the freight contractors be charged with the deficiency, and that Lieut. C. M. Cossett, A. A. Q. M., be allowed to drop said deficiency from his returns. They having no further business to transact, adjourned sine die.

(Signed) " MARSHAL M. EHLE,
"*1st Lieut. 3 Wis. Cav., President.*

(Signed) " P. KINNEVAN,
"*2 Lieut. 5th U. S. Vols., Recorder.*

41 "Approved:

(Signed) "THEO. CONKEY,
"*Capt. 3d Wis. Cav., Com'd'g Post.*

"A true copy:

"C. M. COSSITT,
"*Lieut. Vet. Batt. 1st Col. Cav., A. A. Q. M.*"

In pursuance of the foregoing recommendation the claimant was charged by the Quartermaster' Department with the 122 sacks rejected as a deficiency, and in addition to the 122 sacks he was charged with the 33,236 lbs. of difference in weight of the remainder of the corn before mentioned, and for this difference $4,712.39 was deducted from his account. And there were also deducted for transportation on the 122 sacks rejected $1,468.72, making the total deductions $6,181.11, exclusive of the deduction for the value of the 122 sacks of corn thrown back upon the contractor's hands. As to the 122 sacks, they were carried back by the contractor to Fort Leavenworth, and not being accounted for by him, no claim is now made for them. The claimant has never been paid the above reduction of $6,181.11. A general account
42 was stated between the parties, showing the amounts allowed and deducted. The claimant was paid the total of the amounts allowed, and at the foot he gave the receipt before mentioned in the 8th finding, accompanied by the protest.

XI. On the 6th October, 1865, the claimant's transportation train No. 67 received at Fort Leavenworth, Kansas, one thousand five hundred and five (1,505) sacks of flour, weighing in the aggregate 153,510 lbs., averaging 102 lbs. per sack, to be transported to Fort Union, New Mexico. On the route there was taken from the train, at Fort Aubrey, Kansas, on the 28th November, 1865, by order of the commanding officer, 18,617 lbs. of flour, for which the quartermaster of the post duly receipted; but neither the order of the commanding officer nor the receipt of the
43 quartermaster showed the number of sacks of flour taken from the train. On the arrival of the train at Fort Union, in May, 1866, all of the flour was delivered to the quartermaster except 248 sacks. A board of survey was ordered on the 9th May, 1866, which met on the same day and examined the supplies delivered. The following are the proceedings of the board as reported to the commanding officer and as attached to the bill of lading:

"Proceedings of a board of survey which assembled at Fort Union Depot, New Mexico, by virtue of the following orders, viz:

["Special Orders No. 23.]

"DEPOT QUARTERMASTER'S OFFICE,
"*Fort Union, N. M., May 9th*, 1866.

"A board of survey, to consist of Capt. H. J. Farnsworth, assistant quartermaster U. S. Vols., will assemble at this depot, at 9 o'clock a. m., or as soon thereafter as practicable, to examine and report upon the condition and quantity of a lot of military supplies to be delivered by freight contractor W. S. Shrewsbury, on his bill of lading of train No. 380, (Fort Union train No. 67.)

(Signed) "H. J. FARNSWORTH,
"*Capt. & Asst. Quartermaster, Commanding Depot.*

"FORT UNION DEPOT, N. M., *May 9th*, 1866.

"The board met pursuant to the above orders—present, Captain H. J. Farnsworth, asst. qrmr. U. S. Vols.—and proceeded to examine the supplies delivered by freight contractor W. S. Shrewsbury, in contractor's train No. 380, (Fort Union train 67,) and finds them as follows:

"That the contractor delivered on the 9th day of April, 1866, (614) six hundred and fourteen sacks of flour and two boxes of reading, all in good order and condition, and that on the 9th day of May, 1866, (643) six hundred and forty-three sacks of flour, all in good order and condition—making a total of (1,257) twelve hundred and fifty-seven sacks of flour, and two boxes of reading, showing a deficiency, as per bill of lading, of (248) two hundred and forty-eight sacks of flour.

"The board also finds that there was taken from the train (while en route) at Fort Aubrey, Kansas, (18,617) eighteen thousand six hundred and seventeen pounds (gross weight) of flour, net weight (18,273) eighteen thousand two hundred and seventy-three, by order of Captain W. L. Parker, commanding post, Fort Aubrey, Kansas, and that Lieutenant J. D. L. Parks, 13th Mo. Cav'lry Vols., did give his memorandum receipt for the above-named weight of flour. (See true copy of memorandum receipt attached.)

"The board having no knowledge of the number of sacks turned over by the wagon-master of the train No. 67 (Ft. Union) to the A. C. S. at Fort Aubrey, Kansas, find by taking the average weight of each sack, as per bill of lading, that there was turned over to the A. C. S. at Fort Aubrey (183) one hundred and eighty-three sacks of flour, showing a deficiency of (65) sixty-five sacks of flour, and it is the opinion of the board of survey that the deficiency of (65) sixty-five sacks of flour should be charged to the contractor, W. S. Shrewsbury.

(Signed) "H. J. FARNSWORTH,
"*Captain & Asst. Qrmr., U. S. Vols.*

"The board having no further business before it, adjourned.

(Signed) "H. J. FARNSWORTH,
"*Captain & Asst. Qrmr., U. S. Vols.*

"Approved:

(Signed) "H. J. FARNSWORTH,
"*Captain & Qrmr., Commanding Depot.*"

44 It does not appear that the flour delivered at Fort Union was weighed, nor that there was, in fact, any deficiency of flour other-

wise than was inferred by the board of survey from counting the number of sacks delivered and ascertaining from the bill of lading the number of sacks consigned by the quartermaster of the department at Fort Leavenworth, and thus ascertaining the supposed average weight of the sacks taken at Fort Aubrey. But, in pursuance of the foregoing recommendation of the board, the claimant was charged by the Quartermaster Department for the loss of sixty-five (65) sacks of flour at its cost price, $284.70, and for the transportation of 6,630 lbs. from Fort Leavenworth to Fort Union, $998.97, making a deduction in the aggregate of $1,283.67. The claimant has never been paid this balance. A general account was stated between the parties, showing the amounts allowed and
45 deducted, entitled an account "For the transportation of the following military stores from Ft. Leavenworth, Kansas, on route No. 2, under contract with the United States dated March 27th, 1865, as per the annexed papers in verification of account." The claimant was paid the total of the amounts allowed, and at the foot he gave the following receipt:

"Received, at Ft. Leavenworth, Kans., the 18 of October, 1866, of Bvt. Brig. Gen. J. A. Potter, quartermaster United States Army, the sum of twelve thousand four hundred & seventy-four dollars and thirty-six cents, in full of the above account.

(Duplicate.) "W. S. SHREWSBURY,
"By ANDREW STUART,
His Atty."

The Quartermaster Department also refused to allow the claimant transportation on the flour taken from the train at Fort Aubrey for any greater distance than that between Fort Leavenworth and Fort Aubrey, and deducted the transportation thereon between Fort Aubrey and Fort Union. This deduction appeared on the face of the account before referred to, for the balance of which the claimant receipted in full, as before stated.

46 And the Court of Claims, upon the foregoing facts, decides, as

CONCLUSIONS OF LAW:

I. As to the shrinkage of corn and difference of weight, set forth in the 2d, 3d, 4th, 5th, 9th, and 10th findings, the proceedings of the board of survey did not conform to the terms of Article VIII of the contract, inasmuch as the board did not investigate the facts nor report the apparent causes, nor state whether the loss was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and for the amounts thus withheld the claimant should recover.

II. As to the loss of ten (10) gallons of whiskey, set forth in the 6th finding, the claimant was chargeable with the safe transportation and delivery of the same, and was not excused by the facts found; and for this deduction he should not recover.

47 III. As to the loss of steel and axes, erroneously charged to the claimant, as set forth in the 7th finding, the claimant should recover.

IV. As to the shrinkage and difference of weight of the corn, set forth in the 8th finding, the claimant should recover. But as to the deduction for corn taken from his train at Fort Wyncoop by an unknown military officer, not shown to have been authorized to take the same, the claimant should not recover.

V. As to the deduction for sixty-five (65) sacks of flour, as set forth in the 11th finding,

48 United States Court of Claims.

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THE UNITED STATES.

NOTT, J., delivered the opinion of the court:

This case, which combines a number of distinct causes of action and has required a voluminous and difficult finding of facts, really presents but one or two questions of law. The eighth article of the contract between the parties provides that, "in all cases where stores have been transported under this agreement, a board of survey shall be called without delay upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, to investigate the facts and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control." The same article further provides that these proceedings shall be attached "to the bill of lading, and shall conclude the payment to be made on it." It also provides that "should no board of survey be called, through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores as specified in the bill of lading in good order and condition, and he shall be paid accordingly."

Under this agreement, the claimant at various times and by different trains transported military supplies from Fort Leavenworth to Fort Lyon and other posts. In some cases there appeared to be a deficiency in the weight of the corn transported. The evidence generally satisfies us that the packages, that is to say the sacks of corn, were delivered in good order, unbroken, and that the deficiency was due to shrinkage and to defect in the scales used at the point of destination. In pursuance of the terms of the agreement a board of survey was ordered, and the proceedings of the board are relied upon by the Government as a defense in this action. It may be a question whether the decision of such a board would in any event conclude the party from seeking judicial relief. But here is a primary question, which is, whether the proceedings of the board conform to the terms of the contract.

These proceedings state that the board examined the supplies delivered, and find "packages all correct and in good order, with the exceptions of nine sacks of corn deficient; weight agreeing with the bill of lading, with the exceptions of 4,240 pounds of corn deficient. The board, therefore, recommend that the deficiency be charged to the freight contractor."

It appears from the bill of lading that these sacks of corn averaged 118¾ pounds per sack. It is, therefore, apparent that the nine missing sacks (for which no claim is made by the contractor) could not have weighed 4,240 pounds, and that if "the packages" were all correct and in good order, as found by the board, the deduction ordered was an
49 arbitrary deduction, which any clerk could have made by a simple comparison of the two weights, and which involved the exercise of no real examination or discretion.

But the rule which the parties established for themselves by their agreement was, that in case of "deficiency" the board of survey should

"investigate the facts and report the apparent causes and assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control." In none of these particulars do the proceedings of the board in any manner carry out the intent and terms of the contract. The board did not investigate the facts, it did not report the apparent causes, it did not state whether the loss was attributable to neglect or to the want of care on the part of the contractor, or to causes beyond his control. As to all of these particulars the contractor had the right to receive the investigation of the board, and the contract was so rigid in assuring him of that right, that it provided that if the other party, who alone had the right to convene a board, should fail to do so, he should be deemed to have "delivered all the stores, as specified in the bill of lading, in good order and condition, and be paid accordingly." We do not mean to say that the failure of a board to investigate after it has been properly convened will work the same result in favor of a contractor, but we do think that when a board is convened it must carry out the intent of the agreement in its investigations, or else that its proceedings will not be conclusive and binding upon the contractor.

As to the items for property taken from the trains by officers or soldiers, we are of the opinion that the facts stated throw the responsibility upon the claimant and not on the Government. As to the items for which the claimant accepted reduced payment and receipted in full, without objection or protest, we are of the opinion that he is concluded from prosecuting them under the decisions of the Supreme Court in Clyde and Justice's cases.

The judgment of the court is that the claimant recover the sum of $15,344.28.

The Chief-Justice dissented.

50 In the Court of Claims.

WILLIAM S. SHREWSBURY
vs.
THE UNITED STATES. } No. 6364.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney-General, for the defendants, for the allowance of an appeal, as filed in the clerk's office June 30, 1874, and of the order of the Chief-Justice of said court allowing the same, of the findings of fact by the court and the conclusions of law thereon on which the court founded its judgment, and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this seventh day of September, 1874.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 535. The United States, appellants, vs. William S. Shrewsbury. Court of Claims. Filed 2d October, 1874.

REC. 535—3

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANTS,
vs.
WILLIAM S. SHREWSBURY. } No. 535.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANTS,
vs.
WILLIAM S. SHREWSBURY. } No. 535.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

The claimant and Colonel Potter, a quartermaster, United States Army, on March 27, 1865, entered into a written contract, by which the claimant agreed to transport supplies to certain United States forts and posts. Large quantities of Government stores were delivered to claimant at Fort Leavenworth for transportation to Forts Lyon and Union, and on the arrival of the trains at their destination were turned over to the United States quartermaster in charge. Boards of survey, which were ordered in conformity to Article VIII of the contract, met and examined, in each case, the stores delivered. Article VIII of the contract provided that "In all cases where stores have been transported by the said William S. Shrewsbury, under this agreement, a board of survey shall be called, without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported; and in cases of loss, deficiency, or damage, to investigate the facts and report the apparent causes,

assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and these proceedings—a copy of which shall be furnished to the contractor—shall be attached to the bill of lading, and shall conclude the payments to be made on it. For loss of weight, due to shrinkage, or for leakage of vinegar or molasses, or other liquids, the contractor shall not be liable, if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficiencies or damages the contractor shall pay the costs at the point he receives the articles, and freight shall be deducted in the latter case in proportion to the amount of damage assessed. Should no board of survey be called, through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores, as specified in the bill of lading, in good order and condition, and he shall be paid accordingly. If the amount of loss, deficiency, or damage exceeds the value of the bill of lading, it shall be deducted from any after-payments that may become due. Transportation to be paid, in all cases, according to the actual distance traveled from the place of departure to that of delivery, the distance to be indorsed on the bill of lading by the officer or agent receiving the supplies." (Record, pp. 4 and 5.

In the case of claimant's train No. 5 the proceedings of the board of survey, as reported to the commanding officer and attached to the bill of lading, are as follows:

Proceeding of a board of survey which assembled at Fort Lyon, C. T., by virtue of the following order, viz:

"HEADQUARTERS FORT LYON, C. T.,
"*July* 31*st*, 1865.

"[Special Order No. 145.]

"A board of survey is hereby ordered to meet at the commissary-building to-morrow morning, at 9 o'clock, or

as soon thereafter as practicable, to examine and report upon the quantity and condition of certain commissary and quartermaster stores being received by Lieut. C. M. Cossett, A. A. Q. M. and A. C. S.

"DETAIL FOR THE BOARD.

"First Lieutenant J. A. Cramer, veteran battalion, First Colorado Cavalry.

"First Lieutenant Henry Gronheim, Fifteenth Kansas Cavalry.

"By order of Theo. Conkey, captain, commanding post.

(Signed) "JAMES OLNEY,
"*Second Lieutenant and Post-Adjutant.*

"FORT LYON, C. T.,
"*August 1st*, 1865.

"The board met pursuant to the above order.

"Present: First Lieutenant J. A. Cramer, veteran battalion, First Colorado Cavalry, and First Lieutenant Henry Gronheim, Fifteenth Kansas Cavalry, and proceeded to examine the supplies delivered by freight-contractor W. S. Shrewsbury, in contractor's train No. 124, Fort Lyon, No. 5, and find as follows:

"Packages all correct and in good order, with the exception of nine sacks of corn deficient; weight agreeing with the B. L., with the exception of four thousand two hundred and forty (4,240) pounds of corn deficient.

"The board, therefore, recommend that the deficiency of corn be charged to the freight-contractor, and that Lieutenant C. M. Cossitt, A. A. Q. M., be permitted to drop said deficiency from his return.

"The board then proceeded to other business.

"JOSEPH A. CRAMER,
"*First Lieutenant Veteran Battalion, First Colorado Cavalry, President.*
"HENRY GRONHEIM,
"*First Lieutenant Fifteenth Kansas Cavalry, Recorder.*
"THEO. CONKEY,
"*Captain Third Wisconsin Cavalry, Commanding Post.*" (*Record, p. 9.*)

In pursuance of the foregoing recommendation the claimant was charged by the Quartermaster Department for the loss of nine (9) sacks of corn, and in addition to the nine (9) sacks of corn with the 3,171 pounds of difference in weight of the remainder of the corn before mentioned, and for this difference $449.61 was deducted from his account. The claimant has never been paid this balance. A general account was stated between the parties, showing the amount allowed and deducted, entitled "an account for the transportation of military stores from Fort Leavenworth, Kansas, to Fort Riley, Kansas, on route No. 2, under contract with the United States, dated March 27, 1865, as per the accompanying bills of lading, receipts, and proceedings of boards of survey, to wit."

The claimant was paid the total of the amounts allowed, and at the foot he gave the following receipt:

"Received, at Fort Leavenworth, Kansas, the 23d of October, 1865, of Capt. H. L. Thayer, assistant quartermaster, United States Army, the sum of ninety-one thousand two hundred and forty-three dollars and sixty cents, in full of the above account.

(Signed in duplicate) "W. S. SHREWSBURY,
"By ANDREW STUART,
"*His Attorney.*"

At the time of receiving payment he protested against the deduction, and notified the quartermaster who made the payment that he should look to the defendants for a corrected adjustment and full payment. (Record, p. 10.)

The boards of survey followed the same course in the other trains, and their proceedings were similar to those above cited. (Record, pp. 11 to 22.) It does not appear that any allegation was made at any time by the claimant or his agent, that the proceedings did not conform to the contract, or that any objection was made in any shape to the proceedings; and the protest, found by the court to have been made by the claimant, was to the deductions *per se*, not to the proceedings of the board.

ASSIGNMENT OF ERRORS.

I. That the court erred in deciding that the proceed-

ings of the boards of survey did not conform to the terms of the contract.

II. That the court erred in deciding that the claimant is entitled to the amount of deductions made by the board of survey.

III. That the court erred in assuming that an acceptance by the claimant of the terms of the proceedings and reports of the board of survey was not a ratification of and a waiver of any informality in such proceedings, and that the claimant was not concluded by such acceptance.

IV. That the court erred in deciding that the giving of receipts as in full for the services rendered did not conclude the claimant.

ARGUMENT.

I.

The reports of the board of survey contained everything made necessary by the eighth article of the contract. The condition of the stores was reported, the deficiency in weight noted, and the liability of the contractor for damages and deficiencies, contained in the recommendations of the boards. These are all that the contract contemplated, and the exact form of report was left to the judgment of the boards.

II.

If there were any informalities in the reports of the boards of survey, the claimant waived them by acquiescence in the conclusions of the reports, and acceptance of payment on the vouchers or bills of lading, which included the deductions ordered by the boards, as in full of all services of the various trains against which the boards had charged deficiencies. The agreement was to submit the questions of the condition and quantity of the stores transported by the claimant, to boards of survey, and their reports were to be conclusive as to the payments to be made on the bills of lading or

vouchers. Boards were ordered, and they met and examined the transported stores, and their proceedings were attached to the bills of lading. No protest or objection was made to the composition, the proceedings, or reports of the boards, nor any charge made of informality in the proceedings or reports. The claimant accepted the conclusions of the boards, as in full payment of all services rendered, and then protested against the deductions made by the boards. The boards were in the nature of an arbitration, acting for both parties. (McLean, 248, 258.)

Where there is a submission to arbitration, after a ratification of an award and execution of its requirements, it is too late for the parties to set up any defect in the proceedings or in the award. In the case of Hoogs *vs.* Morse, 31 Cal., 128, the court says:

"The action of the plaintiff in taking a judgment on the award, and then receiving the amount of the judgment in satisfaction, was a waiver of any errors or misconduct on the part of the arbitrators, of which he had notice at the time, and he is charged with notice of all errors or misconduct which were known to his attorney. Under the circumstances of the case we are at loss to perceive how there could be any valid ground for setting aside the award at the instance of the plaintiff, except for fraud discovered after the plaintiff had accepted payment in full of the judgment."

And in Tudor *vs.* Scorell, 20 N. H., 174, it is said:

"But in general a party may waive a condition for which he has stipulated, and that principle seems applicable to the present case. Whatever advantages the parties might have contemplated in requiring the award to be made in writing, they were competent to waive that condition as to the whole or a part of the matters included in it."

If the proceedings were informal, the claimant had the option to accept or not any money under them; but after he waived or cured the informality by acceptance of the terms of the reports, that acceptance was in conformity to the eighth article of contract, which says "the proceedings shall conclude the payment to be

made on the bill of lading," and the contractor cannot now claim that the payments shall not be final, or be in full, or conclude him. No verbal protest could disturb the finality of the claimant's uncontrolled, deliberate action in accepting the amount awarded.

A proper objection or protest to the reports of the boards of survey would have been a refusal to receive the amount under the terms of the report; not, most certainly, a written receipt, as in full, of all services rendered by certain trains, even if accompanied by a verbal protest. A verbal protest to the reports or proceedings of the boards cannot be considered to have any effect when there is an acquiescence in the conclusions of the boards by an acceptance of the amount of the bills of lading, made in conformity to the reports, which the contract declared should conclude the payments. He could not have accepted the award without being concluded.

Boards of survey having been called, payments could not under the contract be made except upon the certificates given and upon which payment was made. Hence he received payment which under the law was necessarily conclusive.

Horsley v Wood, 6 Wall. R. p. 710.
Dawson v Blair, 3 Doug. p. 28.
Miles v Field, 5 Exch. p. 829.
Morgan v Bevin, 9 Bing. p. 672.

III.

The taking of the amount allowed by the boards of survey appointed pursuant to the contract, *i. e.*, by the act of both parties, and giving the receipts as in full payment for all services rendered by certain trains, bring the case within the ruling of the Supreme Court in Justice, 14 Wall., 535; Mason, 17 id., 67; and Sweeney, 17 id., 75, notwithstanding a promise on the part of the claimant to look elsewhere for the amount of the deductions. In fact, this case is more favorable for the United States than those quoted, for the reason stated in Point II, viz: Because it is an acceptance of an award which the contract says shall conclude all payments on the bills of lading.

GEORGE H. WILLIAMS,
Attorney-General.
JOHN GOFORTH,
Assistant Attorney-General.

O

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 535.

THE UNITED STATES, APPELLANT,

vs.

WILLIAM S. SHREWSBURY, APPELLEE.

Appeal from the Court of Claims.

BRIEF OF CHARLES F. PECK FOR APPELLEE.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 535.

THE UNITED STATES, APPELLANT,

vs.

WILLIAM S. SHREWSBURY, APPELLEE.

Appeal from the Court of Claims.

ARGUMENT FOR APPELLEE.

In this case it is shown that under and in pursuance of a written contract with the Government, the claimant transported certain military supplies, and it is admitted that a portion of the stipulated price for the labor has been deducted and withheld.

These deductions amount to $15,344.28, and represent the value of the corn which was the difference between the weight of the corn when received by the contractors, and when delivered by them. The court below finds as a matter of fact that the deficiency arose from the shrinkage of the corn while *in transitu*, and from imperfections in the scales upon which it was weighed, or in other words, that as to the matters in dispute, the claimant actually delivered all the corn intrusted to him, and that the apparent deficiency occurred in the manner stated. There were ten different transportation trains, and a separate finding of facts as to each. These will be found in the record from page 8 to page 23. As no

difference in the statement of these facts appears between the attorneys for the appellant and appellee, it has not been considered material to the case to go into the details of each statement.

The claimants sued for the amount so withheld, and having recovered judgment, the Government appeals.

The controversy turns upon the construction of the following clause in the contract, and the acts committed in reference to it:

"ARTICLE VIII. In all cases where stores have been transported by the said W. S. Shrewsbury under this agreement, a board of survey shall be called without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, to investigate the facts, and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made on it. For loss of weight due to shrinkage, or for leakage of vinegar or molasses or other liquids, the contractor shall not be liable if the packages are delivered in good order and condition and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficiencies or damages the contractor shall pay the cost at the point he receives the articles; and freight shall be deducted in the latter case in proportion to the amount of damage assessed. Should no board of survey be called through failure on the part of the quartermaster's department, or other military authority to convene one, it shall be considered that the contractor has delivered all the stores as specified in the bill of lading in good order and condition and he shall be paid accordingly. If the amount of loss, deficiency, or damage, exceeds the value of the bill of lading, it shall be deducted from any after payments that may become due. Transportation to be paid in all cases according to the actual distance travelled from the place of departure to that of delivery, the distance to be endorsed on the bill of lading by the officer or agent receiving the supplies."

It is shown by the finding of facts that when the various lots of corn were delivered, boards of survey were called which made reports in the following form:

"FORT LYON, C. T., *August 3d*, 1865.

"The board met pursuant to the above order. Present Lieut. J. A. Cramer, veteran battalion, 1st colored cavalry, and First Lieut. Henry Gorham, 15th Kansas cavalry, and proceeded to examine the supplies delivered by freight contractor W. S. Shrewsbury, in contractor's train No. 141, Fort Lyon No. 10, and find as follows: Condition good; weight agreeing with the B. L., with the exception of nine hundred and eighty-seven pounds of corn deficient. The board recommend that the freight contractor be charged with the deficiency of nine hundred and eighty-seven (987) pounds of corn, and that Lieut. C. M. Cossitt, veteran battalion, first colored cavalry, acting assistant quartermaster, be allowed to drop the same from his returns."

And that upon these reports the value of the corn found to be short in weight was deducted in making up the accounts, and the contractors received the amount of their freight money less these deductions, and signed the receipts therefor in the following form:

"Received at Fort Leavenworth, Kansas, the 23d of October, 1865, of Captain H. L. Thayer, assistant quartermaster United States army, the sum of (ninety-one thousand two hundred and forty-three dollars and sixty cents) in full of the above account."

And at the time of receiving payment, the contractor protested againt the deductions and notified the quartermaster who made the payments that he should look to the defendant for a corrected adjustment and full payment.

Upon this statement of facts the appellant urges three defences:

1st. That the award of the board of survey was a substantial compliance with article VIII of the contract; and its decision thus made was in each case final and conclusive upon the claimant.

2d. That if the action of the board of survey was not sufficient to bind the claimant, he has accepted its terms, and has thereby waived any informality in it.

3d. That the receipts given by the claimant when he received the amounts allowed, concluded him and released whatever rights he may have had.

I.

It was optional with the Government whether a board of survey should be called in any case. If none should be called, it was to be considered that no deficiency existed, and full payment should be made.

The board of survey was to be called by the Government, its proceedings were to be all for the benefit of the defendant, its action and proceedings were *ex parte*, and it was composed entirely of Government officers. (See record pp. 10 to 22.)

It is unnecessary to regard this stipulation concerning the board of survey as in all respects amounting to an arbitration. It is sufficient to say that it was analagous to such a proceeding, and is to be governed by the same principles so far as they are applicable.

Some method was necessary to determine the quantity and condition of the stores when delivered, and the responsibility for their loss or damage.

It was a matter about which the contracting parties had the undoubted right to provide for by agreements between themselves. And as the law does not make agreements for parties, but only carries into effect such agreements as they make for themselves, I ask the consideration of the court to the precise terms agreed upon.

The contractor consented that the officers constituting the board of survey might for the purpose of ascertaining whether he had done his duty, do certain things, viz:

1st. Examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage;

2d. To investigate the facts;

3d. To report the apparent causes;

4th. To assess the amount of loss or injury;

5th. To state whether it was attributable to neglect or want of care on the part of the contractor or to causes beyond his control.

These five points he agreed might be passed upon by the board, nothing more and nothing less.

The court below, whose conclusions of fact cannot be appealed from, says, (p. 25:)

"The board did not investigate the facts; it did not report the apparent causes; it did not state whether the loss was attributed to neglect or the want of care on the part of the contractor, or to causes beyond his control."

All the board did was to examine the quantity and condition of the stores, and finding a deficiency assessed the amount of it, as a matter of course, to be docked from the freight money.

The board ended the investigation where it should have begun it. Having ascertained that there was a deficiency, and the amount of it, then the issue arose as to whom it should be charged. For this purpose they were required to go on and investigate the facts concerning the deficiency, to report the apparent causes of the deficiency, and to state whether, in their judgment, it was attributable to neglect or want of care on the part of the contractor, or to causes beyond his control.

The contract says *these proceedings* shall conclude the payments to be made, and I submit that these proceedings are necessary for that purpose.

It will be observed that neither the commanding officer at the station, nor the officer receiving the property, nor the officers constituting the board, had anything to do with the

payment of the freight money. A copy of these proceedings were to be attached to the bill of lading, and the payments were made at a distant point. The board therefore merely established the proceedings upon which another officer was to act in making up the accounts, and it was all important that these proceedings should be complete, and in accordance with the contract.

No case could better illustrate the necessity of complying with the precise terms of a submission than the one at bar. This same article eight of the contract (p. 4) declares that the contractor shall not be liable for loss of weight due to shrinkage, if the packages should be delivered in good order, and the court below found that, as a matter of fact, the loss in these cases was due to shrinkage, and impliedly the board found the same fact, for it reported that the packages were in good order. If the board had taken the next step, which it was required to take, and reported the apparent causes of the deficiency, and whether it was attributable to neglect or want of care on the part of the contractor, or to causes beyond his control, a totally different result must have been reached.

This contractor placed himself, to a great extent, in the hands of the Government. The fact that so many advantages were on the side of the appellant renders it all the more imperative that the conditions upon which those advantages were to be used should be complied with. He did not stipulate that when goods were received a board of survey might examine into the weight, and if a deficiency was found that it might, in its discretion, charge him with the loss, regardless of all other facts. Yet this is precisely what was done.

"The power and authority of an arbitrator is derived entirely from the submission; he must therefore make his award strictly in pursuance and in conformity with the submission."

Watson on Arbitration, p. 145.

"It is a general rule that unless the arbitrator makes his award of all matters submitted to him, the award is entirely void."

Ibid, p. 158.

"Whenever a special authority is created, those who give it have a right to annex to it their own terms, with which he on whom it is conferred, must comply."

Russell on Arbitration, 3d. Ed., p. 235.

"If the submission contain instructions concerning the form, execution, or publication of the award, they must be strictly followed."

Morse on Arbitration, p. 259.

"An award owes its force and validity to the agreement of the parties and is not, of course, binding upon them unless it has been made in the manner which the agreement has pointed out"

Tudor vs. *Scovell,* 20 *N. H.*, 174.
Montague vs. *Smith,* 13 *Mass.*, 396.
Allen vs. *Galpin,* 9 *Barb.*, 246.

Mr. Morse says: "This rule however is so far limited in its application to essentials, that it is not to be extended to frivolous inconsistencies or neglects. The award will not be vacated for matters of sheer insignificance. On the other hand, considerable strictness is shown in determining what are essentials; generally however it may be said, that if the parties distinctly agree, that a certain specific formality shall be observed in the execution of the award, their express demand must be complied with, or the award will be bad."

Morse on Arbitration, p. 260.

II.

It is further alleged by the appellant that if there were any informalities in the reports of the boards of survey, the claimant waived them by acquiescence in the conclusions of the reports and acceptance of payment on the vouchers or bills of lading.

The argument for the appellant proceeds upon the misapprehension that the contractor obtained an award in his favor, and received the money. Such is not the fact. The board of survey had no jurisdiction over the matter of freight money; that was definitely fixed by the contract, there was no controversy concerning it. There was no award, and could be none, as to the moneys earned by the contractor, but the report had reference solely to the counter charges claimed by the United States. The moneys received by the claimant had no reference to the matters considered by the board, and they were both paid and received with an explicit understanding that it was not to be a final adjustment.

The cases cited in the brief for appellant are based upon the principle that a party cannot take the benefits of an award without accepting its disadvantages.

There is no such principle involved here. The claimant took that which had no relation to the controversy, submitting for the time to the reduction, but giving notice that he would claim the amount withheld.

III.

The final ground of defence is that the claimant is concluded by the acceptance of the money and the receipt he signed.

The vouchers were in the usual form, showing the amount of freight money, and deducting the value of the corn alleged to be deficient, and at the bottom are the words "received at Fort Leavenworth, Kansas, the 12th of October, 1866, of Brevet Brigadier General J. A. Potter, quartermaster United States army, the sum of (three thousand and seventy-two dollars and sixty cents) in full of the above account."

And the court finds that at the time of receiving payment the claimant protested against the deductions, and notified the quartermaster who made the payment that he should look to the defendants for a corrected adjustment and full payment.

This is the familiar defence of accord and satisfaction. Blackstone says:

"Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account; as if a man contract to build a house or deliver a horse, and fail in it, this is an injury for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away that action." (*Book III, p.* 15.)

The gist of the inquiry is whether the money was paid and accepted as a satisfaction. If it was, there is an end of the case. If it was not, the right of action remains.

This court has had occasion to repeatedly consider the precise question, under what circumstances will the payment and receipt of money be held as sufficient evidence of this satisfaction? Of course the intention of the parties must govern, not the secret intentions or mental reservations, but the intention as evidenced by their acts and plain declarations.

In the case of Theodore Adams the claimant held large claims against the War Department, which the Secretary of War refused to pay or consider, except upon the investigation of the board known as the Holt, Davis and Campbell Commission. That commission gave the claimant an award for a reduced sum, and he signed a receipt in full of all demands; and afterwards received the money, signing a receipt in full for the account stated. No protest was made and nothing said on either side. This court held that the receipt was no bar but the circumstances showed that the money was accepted in satisfaction of the entire claim.

7 *Wallace R.*, 463.

Afterwards it was attempted to take the case out of the rule by showing that Adams had not submitted his claim to the commission. But the court held that as he had made himself a party to the proceedings and had accepted the

money he was concluded ; nothing was said in this case about a protest, none having been made.

7 *Wallace R., p.* 463.

The next case, that of Child, Pratt and Fox, (12 Wallace R., p. 232,) was the same as Adams', excepting it appeared affirmatively that claimants had not submitted their claims to the commission. The court again decided that the money was received in satisfaction of the claim, because it was a compromise fairly made. The opinion reads:

"If there had been no reference to and no finding by the commission, it would still remain true that here was a claim, the justice of which had been denied and the amount that was due on it had been in dispute for nearly two years. The Government finally says to the claimants: 'we will pay you a certain sum on this disputed claim, provided you will take it in full satisfaction of the whole,' when without intimidation, without fraud or concealment on the part of the Government, *without protest or objection* on their part, the claimants accept the money offered, and sign a receipt acknowledging it to be in full of the whole claim. Is not this a legal and binding compromise of the disputed demand? Is it not a voluntary adjustment of the matter in dispute between the parties?"

This is plain statement of the conditions required for an accord and satisfaction ; and I insist that the case stated by the court differs in nearly every essential particular from the one at bar.

The case of Clyde, (13 *Wallace, p.* 37,) was where a charter party had been signed for the use of a steamer ; and afterwards the Government officers had reduced the rate of payment. Upon this a dispute arose and subsequently the claimant accepted the reduced rate and signed a receipt in full. It was held that he received the amount in satisfaction of his claim. There was no objection or protest shown, and therefore it fell within the rule in Child, Pratt and Fox's case.

The case of Justice, (14 *Wallace R., p.* 535,) was like that

of Child, Pratt & Fox, excepting that no receipt was given. The court held that the acceptance of the money under the award made, *without objection or protest*, was conclusive upon the claimant, and that no receipt was necessary. Care was taken in this last case to define the limits of the rule laid down, as follows:

"It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators mutually chosen, but from such submission neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, *or can accompany his receipt, if he chooses to take it, with a proper protest. This protest is necessary to inform the Government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with this knowledge, and under these circumstances, the money is paid, there can be no just cause of complaint, and the status of the parties is not affected by anything which transpired before the commission.*"

The rule here laid down covers this case and laps over all around. Even upon the extreme view taken by the Attorney General, that the board of survey passed upon the whole claim, and that the claimant accepted the money under its award, it was only required in order to preserve all of his rights that he should protest at the time of receiving the money that it was not in satisfaction of the whole claim. If after such protest the officers saw fit to pay him, his status was not affected by such payment.

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